UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STATE OF NEW YORK and DENISE M. SHEEHAN, as Commissioner of the New York State Department of Environmental Conservation,

Plaintiffs,

-against-

NEXT MILLENIUM REALTY, L.L.C., et al.,

Defendants,

NEXT MILLENNIUM REALTY, LLC, 101 FROST STREET ASSOCIATES, L.P., 101 FROST STREET CORPORATION, EMILY SPIEGEL, individually, and as trustee under an agreement of trust for the benefit of Pamela Spiegel and Lise Spiegel, JERRY SPIEGEL,

Third-Party Plaintiffs,

-against-

ADCHEM CORP., et al.,

Third-Party Defendants.

Index Number 06-CV-1133 (SJF)(ARL)

FROST STREET PARTIES' OPPOSITION TO THE APPROVAL OF THE CONSENT DECREE AND SUPPLEMENTAL CONSENT DECREE

FROST STREET PARTIES' MEMORANDUM OF LAW IN OPPOSITION TO THE APPROVAL OF THE CONSENT DECREE AND SUPPLEMEMENTAL CONSENT DECREE

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INTRODUCTION

Next Millennium Realty, LLC, 101 Frost Street Associates, L.P., 101 Frost Street Corporation, the Estate of Emily Spiegel and the Estate of Jerry Spiegel (collectively, the "Frost Street Parties"), by and through their attorneys, Kevin Maldonado and Associates, LLC, submit this Memorandum of Law in Opposition to the State of New York's ("State") Motion to Approve the Consent Decree filed on October 29, 2014 ("Consent Decree") and Supplemental Consent Decree filed on November 19, 2014 ("Supplemental Consent Decree") (collectively, the "Consent Decrees").

PRELIMINARY STATEMENT

It is not disputed by the Frost Street Parties that the legislative scheme established by the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. Section 9601 et seq. ("CERCLA") encourages settlement. CERCLA places heavy pressure on non-settling parties to settle, by denying non-settling parties typical due process protections and rights, and exposing non-settling parties to a draconian joint and several liability for a potential disproportionate share of CERCLA damages in an action. The Congress, Supreme Court and Second Circuit have authorized and approved this abridgment of due process in the interest of encouraging timely responses to environmental contamination.[1] The one semblance of due process for non-settling parties provided under CERCLA is the Court's obligation to scrutinize CERCLA settlements to ensure that the settlements are fair and reasonable before they are approved. The Court's decision as to whether a settlement is fair and reasonable is determined by an analysis of the comparative fault of the parties and the potential damages.

[1] 42 U.S.C. Section 9601 et seq.; United States v. Atl. Research Corp., 551 U.S. 128, 129 (2007); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 124 (2d Cir. 2010).

This Court is now being asked to scrutinize the settlement of certain Defendants' and Third-Party Defendants' liability to the State of New York (the "State") to determine if the settlements are fair and reasonable. Based upon the record before the Court, this is an impossible task.

The settling parties have not submitted one piece of evidence, testimony, documentation or even unsupported narrative to allow the Court to determine the comparative fault of each party. New York Courts generally use some or all of the following factors to determine comparative fault of the parties in CERCLA matters: (1) whether a party's contribution to release is distinguishable; (2) the amount of hazardous substance involved; (3) the degree of toxicity of the hazardous substance involved; (4) the degree of involvement of the person in the manufacture, treatment, transport or disposal of the hazardous substance; (5) the degree of care taken by the parties with respect to the hazardous waste involved; and (6) the degree of cooperation between the party and state, federal, or local authorities preventing harm to the public health or the environment, including efforts to mitigate damage after a release occurs.[2]

The record in this case is devoid of any information to allow the Court to make an informed decision of what the comparative fault of each party is in this action.

What the State has provided is a 112 page itemization of expenses as Exhibit C to the State Memorandum ("Expense Summary" or "Cost Summary"). The State then added up certain categories of expenses and did a straight per-capita calculation allocation of the costs to the parties involved in the study. The State makes no attempt to allocate the damages across parties

[2] These are commonly referred to as the Gore factors. New York State Elec. & Gas Corp. v. FirstEnergy Corp., 808 F. Supp. 2d 417, 529-30 (N.D.N.Y. 2011). An alternative list of factors (the Torres factors) provide a more "real world" construct for allocating those expenses: (1) the extent to which cleanup costs are attributable to the waste for which the particular parties are responsible; (2) the parties' degree of culpability; (3) the benefit realized by the party from disposal of the waste; and (4) the party's ability to pay. United States v. Davis, 31 F.Supp.2d 45, 63 (D.R.I.1998), aff'd, 261 F.3d 1 (1st Cir.2001); FirstEnergy, 808 F. Supp. 2d at 530 (holding that the volume of waste attributable to each PRP was the most relevant factor).

based upon actual facts that evaluate fault or any of the equitable factors. Moreover, the State does not provide a percentage liability for any settling defendant or non-settling defendant in this action. In fact, Assistant Attorney General Janice Dean, prior lead counsel for the State in this action, in a response to a subpoena and deposition notices focused on obtaining information on the State's allocation of damages between defendants in the action, replied: "The State does not take the position in this litigation that 'damages' and 'responsibility' . . . are allocable, and therefore has no documentation or witness to produce in response to those requests, either."[3] Instead of producing documents or witnesses supporting a fair allocation between the parties based upon well established factors, the State simply does a per capita calculation of various costs and adds the costs to determine a party's purported share of damages. Then the State inexplicably deviates from the settling parties' stated per capita shares in the settlements it reached with the parties (both upward and downward) without explanation or reason. Simply put, there is no information or record before this Court to enable it to make a fairness determination based upon comparative fault of the parties. The Court is being asked to determine fairness in an informational vacuum.

Additionally, the Consent Decrees should not be approved because certain elements of the Consent Decrees are not fair, reasonable or consistent with the intent of CERCLA for the following reasons: (1) the State releases the Third-Party Defendants[4] sued by the Frost Street

[3] Janice Dean Letter to Kevin Maldonado dated May 2, 2014, Ex. 1 to this Memorandum).

[4] In addition to settling its direct claims asserted against owners and operators of 13 properties located within the New Cassel Industrial Area ("NCIA"), the State is settling liability of claims asserted solely by the Frost Street Parties against Third-Party Defendants responsible for the contamination of the Frost Street Properties, the contamination of groundwater under the Frost Street Properties, and the contamination of groundwater flowing off the Frost Street Properties into the Eastern Plume in the State's Operable Unit 3 ("OU -3"). These Third-Party Defendants include: (1) former tenants of the 89 Frost Street property whose operations or the operations of their subtenants released contamination at the Frost Street Properties (the "Adchem Defendants"); and (2) the owners and/or operators of three properties, GTE Corporation, Vishay Intertechnology, Inc., and Sulzer Metco (US) Inc. (collectively, the "Upgradient Defendants"), located upgradient from a hydrogeological perspective from the Frost Street Properties.

Parties and grants them contribution protection for the Operable Unit 2 ("OU-2") deep groundwater remedy without allocating a single dollar of the settlement proceeds to this liability; (2) the State arbitrarily and inconsistently allocates a disproportionate share of the settlement proceeds to a Natural Resource Damage ("NRD") claim that is factual and legally unsupportable; and (3) the State uses a per-capita allocation of past cost damages across the 13 NCIA sites and then deviates from the per-capita allocation without explanation or reason and with no comparative fault evaluation.

Recently, appellate courts have insisted upon close scrutiny of the fairness of settlements, particularly when a state, and not the federal government, is the plaintiff, as here. See Arizona v. City of Tucson, 761 F.3d 1005, 1014 (9th Cir. 2014).

As discussed in detail below, the settlement of the Upgradient Parties' liability and granting of contribution protection for the OU-2 deep groundwater contamination, without allocating a penny of settlement proceeds to the OU-2 deep groundwater costs, is demonstrative of the unfair and unreasonable nature of the settlement. Specifically, for years the State has been demanding that the Frost Street Parties remediate a section of deep groundwater located under the Frost Street Properties between the depth of 150 feet to 250 feet below the ground surface ("OU-2 Deep Groundwater").[5] The cost of this system has a discounted present value in excess of $10,150,000.[6] The existing data demonstrates that the OU-2 Deep Groundwater is contaminated as a result of a very large plume of contamination originating from the Upgradient Parties' properties and flowing under the Frost Street Properties.[7] The Frost Street Parties have

[5] The State has continued to make this demand for the Frost Street Parties to implement and pay for the OU-2 Deep Groundwater remedy despite the State's own determination that the groundwater circulation well ("GCW") treatment is not technically feasible, and the Deep Gr oundwater Contamination will be remediated 100 feet further down gradient by the EPA OU-1 groundwater pump and treat remedy required by the EPA OU-1 Record of Decision.

[6] Affidavit of Joseph Heaney dated December 29, 2014, Ex. 2, p. 5).

[7] See Generally Affidavit of Brian Caldwell, dated December 29, 2014, Ex. 3).

asserted a claim in this action for contribution against the Upgradient Parties for the OU-2 Deep Groundwater damages. For the past decade, the State has repeatedly denied the Frost Street Parties' multiple requests for the State to assert direct claims against the Upgradient Parties. This has forced the Frost Street Parties to expend significant resource and time prosecuting the claim for damages against the Upgradient Parties. In the contemplated settlement, the State would receive $1,850,000 in settlement proceeds from the Upgradient Parties. Pursuant to paragraph 20 of the Consent Decree, 65% would be allocated to OU-3 past costs and 35% would be attributed to the NRD claims. No part of the settlement would be allocated to the $10,150,000 OU-2 Deep Groundwater remedy demanded by the State. The Consent Decree then grants the Upgradient Parties contribution protection, preventing the Frost Street Parties from pursuing the parties that created the adverse environmental condition that exists in the OU-2 Deep Groundwater and potentially leaving the Frost Street Parties responsible for a $10,150,000 remedy which cleans up the contamination created by the Upgradient Parties, without any recourse against these parties. It is difficult to imagine how the State deems this scenario fair and reasonable. In fact, the State does not even attempt to address this inequitable settlement result in its motion papers or proposed Consent Decrees, which are silent on the dismissal of the OU-2 Deep Groundwater Claim without allocating any consideration to the claim.

Finally, the State settlement is not a final resolution of all of the State's claims or other future cost claims. Specifically, a determination of the States' future costs is carved out of the release and contribution protection provisions of the Consent Decrees. Moreover, future costs for EPA liability for contamination of the Sites is not part of the settlement. The Frost Street Parties have plead and advanced a declaratory judgment cause of action seeking judicial allocation of all future damages concerning the contaminated sites among the Defendants and

Third-Party Defendants in this action. Because the State has not released its claim for all future costs, CERCLA contribution protection does not bar the Frost Street Parties' declaratory judgment claim for an allocation of unreleased future costs. The Frost Street Parties' claim must be permitted to go forward on the issue of allocation of future costs between all Defendants and Third-Party Defendants, as the claim has not been dismissed by motion and it is not covered by contribution protection. These future costs currently include the unreleased State future costs and the EPA OU-1 liability.

STATEMENT OF FACTS

The Frost Street Parties respectfully refer the Court to the Report and Recommendation of Judge Michael L. Orenstein for a recitation of the undisputed facts concerning case background.[8] Moreover, the Frost Street Parties agree with the facts enumerated in the State's Memorandum of Law in Support of Approval of the Consent Decree dated August 22, 2014 ("State Memorandum") at pages 5-7 and most of the facts enumerated in the Settling Parties' Memorandum of Law in Support of the Approval of the Consent Decrees dated September 19, 2014 ("Settling Parties Memorandum") at pages 2-12.[9] Additional relevant facts will be enumerated by the Frost Street Parties in the Argument Section of this brief in conjunction with the argument.

The Statements of Facts contained in the State Memorandum and Settling Parties Memorandum are more noteworthy for what they do not say. Nowhere in the Statement of Facts or record is there an enumeration of facts or information concerning the relative fault of each settling party versus non-settling parties.

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[8] Report and Recommendation, State of New York et al. v. Next Millennium Realty, LLC, et al., Index No. 2:03-cv-05985-ARL, Document No. 592, Sept. 24, 2010.

[9] The Settling Parties Memorandum Statement of Factual Background has several material inaccuracies which will be addressed in this section.

A. Division of Costs By State.

The only attempt to justify the allocation of settlement costs based upon relative contribution of contamination is contained in the first full paragraph on page 8 of the Settling Parties Memorandum, wherein the Settling Defendants falsely and without support generically attempt to claim that the State "allocated its past costs and NRD to the individual properties based upon the amount of alleged contamination at or migrating from the properties and the resources deployed to address same." This is a false statement. By its own admission, the State has acknowledged that it has no documentation or witnesses on allocation of damages, and it takes the position that "damages" and "responsibility" are not "allocable" between parties or plumes. (Dean Letter, Ex. 1, p. 2). In fact, nowhere within the 25 page State Memorandum does it state that an allocation of damages was "based upon the amount of contamination at or migrating" from any site or any other comparative fault consideration.

The only support provided by the State in support of its division of damages in this action is contained in the State's Cost Summary at Exhibit C to the State Memorandum. The cost summary is a straight up mathematical allocation of damages based upon a per-capita division of costs. (See per-capita calculation sheets at pages 4, 20, 27, 34, 36, 71, 75, 77, 79, 83, 85, 87, 89, 95, and 99). The majority of expenses were split equally between the 13 Sites, with the exception of Bowling Green well field costs. With respect to costs associated with the Bowling Green well field, including, investigation costs, guard well installation costs and wellhead treatment system costs, these costs were split equally between the nine Eastern and Central Plume defendants. (Id. at pages 77-78, 85-86). The Western Plume defendants were excluded from these costs by the State. This largely accounts for the difference in total damages between the Western Plume defendants and the other defendants.

The State's per-capita allocation of costs is summarized in Exhibit C to the State Memorandum. (Id. at p. 2). As demonstrated by the summary, personal service costs are essentially identical for the 13 sites. Non-Personal Service costs are essentially identical for the Eastern and Central Plume defendants. Because of the carve out for the Bowling Green well field cost, the Western Plume defendants' non-personal costs are less than the Central and Eastern Plume defendants' non-personal costs. Each of the Western Plume defendants' costs are essentially identical. The State's Cost Summary demonstrates that costs were divided based upon per-capita math, without any consideration of comparable fault factors, including quantities of contamination released at the various sites in the NCIA.

B. Factual Misstatements Concerning the Eastern Plume.

The Settling Defendants have made several misstatements of fact concerning the Eastern Plume at pages 8-9 of the Settling Parties Memorandum. First, the Direct Defendants state that "the Frost Street Defendants are the only Direct Defendants with property alleged to have contributed to the Eastern Plume." This is false and misleading. The Utility Manufacturing defendant is also a contributor to the Eastern Plume and a direct defendant. (OU-3 ROD at Ex. A to the State Memorandum at pp. 8, 12). Additionally, the Upgradient Defendants and Adchem Defendants are also contributors to the Eastern Plume, though not direct defendants.

Next, the Settling Defendants state that: "[t]he State maintains that both the Eastern and Central Plume comingle at depth and extend into the area of the Bowling Green well field." This is also inaccurate. First, in 2003 the DEC acknowledged in the OU-3 ROD the existence of "three separate plume areas" and a commingling of the Eastern and Central Plumes at deeper depths. (See OU-3 ROD at pages 15-16 and Figures 4-7). At no time did the DEC determine that the Eastern Plume impacted the Bowling Green well field in the OU-3 ROD or any other

document. In fact, the DEC OU-3 ROD indicates that the Eastern Plume is generally located "south of Old Country Road just North of the Bowling Well Field." Id. Contrasted against the DEC observation concerning the Central Plume, which is characterized by 1,1,1-TCA and "extends into the vicinity of the Bowling Green well field." Id.

Since 2003, both DEC and EPA have conducted additional testing and studies to identify more precise locations of the three plumes. Current data shows that the Eastern Plume is separate and distinct from the Central and Western Plumes. This has been confirmed by a new monitoring well located directly between the Eastern Plume and Central Plume which has no contamination in it and also a new understanding of the groundwater flow direction of the Eastern Plume.[10]

The Separate and Distinct nature of the Eastern Plume was most recently confirmed by the EPA and its consultants during the course of the preparation and issuance of the EPA OU-1 ROD. HDR and O'Brien Gere ("HDR/OG"), on behalf of the EPA, conducted a Supplemental Feasibility Study ("SFS") for the EPA OU-1 (DEC OU-3) area. After a full evaluation of all available data, installation of additional sampling wells and resampling existing wells, HDR/OG determined "[c]onsistent with NYSDEC's FS there appears to be **three separate plumes** within OU1 with different contaminant profiles." (See HDR/OG SFS dated July 2013, Ex. 4, pp. 3-7 and Fig. 3-2, 3-4) (emphasis added). This determination was incorporated into OU-1 ROD by EPA which states: "[b]ased on an evaluation of groundwater data collected through 2011, three groundwater plumes exist at OU1 (the eastern, central and western plumes)." (EPA OU-1 ROD, p. 10 and Fig. 2). Additionally, in the Public Comment section of the OU-1 ROD, EPA states: "[t]he presence of TCA in the OU1 central plume in greater concentrations relevant to the OU1

[10] EPA, Record of Decision: Operable Unit One, New Cassel/Hicksville Ground Water Contamination Superfund Site, September 2013 ("EPA OU-1 ROD") at p. 10.

eastern and OU1 western plume supports the conclusion that there are three separate plumes. The lack of contamination in MW-15 supports the conclusion that the OU1 eastern plume is separate from the OU1 central plume . . . ." (Id. at Appendix V, p. 3, Comment 3).

The separate and distinct nature of the Eastern Plume from the Central and Western Plumes was confirmed by the DEC Project Manager, Jeffrey Dyber. In his deposition, Mr. Dyber testified as follows:

> Q. How many plumes exist in the DEC OU3?
> A. There are three of them.
> Q. Do the three Plumes have names?
> A. The DEC has designated the plumes the eastern plume, the central plume and the western Plume.
> Q. And these are three separate plumes, correct?
> A. Yes

(Deposition of Jeffrey Dyber at 34:10-18, Aug. 28, 2014, Ex. 5). Mr. Dyber also confirmed that the three plumes are "distinct" and characterized by different contaminants of concern. (See Dyber Aff. at Ex. E to State Memorandum at ¶ 14; Dyber Dep. at pp. 80-81, Ex. 5).

ARGUMENT

POINT I

THE CONSENT DECREES SHOULD NOT BE APPROVED

The Frost Street Parties oppose the approval of the Consent Decrees on two grounds. First, the record does not contain sufficient information to permit the Court, or any party, to make a determination of the fairness of the settlement, or contain a description of the methodology utilized by the State in reaching the settlement based upon some measure of comparative fault. When presented with an "informational vacuum", it is impossible for the Court to make a determination if the settlements are substantively fair, reasonable, and consistent with CERCLA's objectives.

Secondly, even while operating in this "informational vacuum", certain provisions of the proposed settlement do not meet the legal standard as being substantively fair and reasonable. The following proposed elements of the settlement are not fair and reasonable: (1) the State releases the Third-Party Defendants sued by the Frost Street Parties and grants them contribution protection for the Operable Unit 2 ("OU-2") deep groundwater remedy without allocating a single dollar of the settlement proceeds to this $10,150,000 liability; (2) the State arbitrarily and inconsistently allocates a disproportionate share of the settlement proceeds to a Natural Resource Damage ("NRD") claim that is factual and legally unsupportable; and (3) the State uses a per-capita allocation of past cost damages across the 13 NCIA sites, deviates from the per-capita allocation without explanation or reason, and fails to do a comparative fault evaluation.

A. Legal Standard for Approval of CERCLA Settlements.

This Court has an obligation to scrutinize the terms of a proposed consent decree under CERCLA. Arizona v. City of Tucson, 761 F.3d 1005, 1008 (9th Cir. 2014); 42 U.S.C. § 9622. This Court must independently scrutinize the terms of proposed consent decrees by, *inter alia,* comparing "the proportion of total projected costs to be paid by the [settling parties] with the proportion of liability attributable to them." Arizona, 761 F.3d at 1008.

"This statutory framework contemplates that potentially responsible parties who do not enter into early settlement agreements may ultimately bear a disproportionate share of the CERCLA liability." Id. at 1011.

In order to approve the Consent Decree, this Court must conclude that the agreement is procedurally and substantively fair, reasonable, and consistent with CERCLA's objectives. 55 Motor Ave. Co. v. Liberty Indus. Finishing Corp., 332 F. Supp. 2d 525, 529-30 (E.D.N.Y. 2004) (approving an unopposed Consent Decree); Arizona, 761 F.3d at 1011-12. This Court must find

that the agreement is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each [potentially responsible party] has done." Arizona, 761 F.3d at 1011. The court must "gauge the adequacy of settlement amounts to be paid by settling [parties by comparing] the proportion of total projected costs to be paid by the settlors with the proportion of liability attributable to them, and then factor into the equation any reasonable discount for litigation risks, time savings, and the like." Id. at 1012. A district court abuses its discretion when it fails to engage in this comparative analysis. Id.

The court's review of a proposed CERCLA consent decree must not occur in an "informational vacuum'" or if the "record contains 'no information at all on an important point'". Id. (citing United States v. Montrose Chem. Corp. of California, 50 F.3d 741, 746-47 (9th Cir. 1995)). Absent sufficient information, the court will be unable to "engage with that information" and explain in a reasoned opinion why the proposed settlement is fair, reasonable and consistent with CERCLA's objectives. Id.

Although the Environmental Protection Agency is afforded deference with regard to its interpretation of CERCLA, state agencies are not afforded the same deference. Id. at 1014. Thus, when a state agency, as opposed to the EPA or federal government, is a party to a proposed CERCLA consent decree, the court does not defer to the State to the same degree as the courts defer to the federal government. Id. Rather, the courts afford a state agency "some deference" with regard to the environmental issues underlying the CERCLA consent decree. Id.

In Arizona, the State reached a proposed settlement agreement with 22 settling parties, requiring the parties to pay specified damages to the State in exchange for full release of liability under CERCLA. Id. at 1008. The district court approved the settlement agreement without

engaging in a comparative analysis, but simply accepted the State's representation that the settlements were fair and reasonable. Id. at 1014. The Ninth Circuit reversed and remanded the matter to the district court to determine whether the settlements were fair after doing a sufficient comparative fault analysis. Id. at 1015.

The fairness of a CERCLA settlement is judged in both procedural and substantive terms. 55 Motor Ave., 332 F. Supp. 2d at 529-30. A settlement is deemed to be substantively fair "when it effectively achieves 'corrective justice and accountability: a party should bear the cost of the harm for which it is legally responsible.'" Id. at 530. Thus, the court must ensure that liability is apportioned according to comparative fault. Id. The government's chosen method of determining comparative fault will be overturned if it is arbitrary, capricious, and devoid of a rational basis. In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig., 1:00-1898, 2014 WL 2722002 (S.D.N.Y. June 11, 2014) (holding that the proposed consent decree was not fair or reasonable because the government's apportionment of liability was inconsistent and unreliable and that the government severely underestimated the settling defendant's share of liability).

B. There is No Information in the Record to Allow the Court to Make a Fairness Determination Based Upon Comparative Fault or to Evaluate the Methodology Employed By the State in Reaching Settlement Amounts.

As discussed above, the Court is required to scrutinize the record to make certain that the settlement is fair, reasonable and consistent with the objectives of CERCLA. Arizona, 761 F.3d. at 1008. A prerequisite to the Court being able to engage in this scrutiny is to have a record to scrutinize. The settling parties have not submitted one piece of evidence, testimony, documentation, affidavits or even unsupported narrative to allow the Court to determine what the comparative fault of each party is in this matter.

The reason the Court does not have this information before it is because, as admitted by

AAG Dean in writing, the State has not done a comparative fault analysis and accordingly does not have any witness or document relative to the comparative fault evaluation. Specifically, AAG Dean states in a letter to counsel in response to a subpoena and deposition notice:

> The subpoena also seeks information about the "allocation of responsibility between the defendants" and one of the deposition notices refers to "the allocation of damages between the defendants and/or plumes." The State does not take the position in this litigation that "damages" and "responsibility," undefined terms in your subpoena and deposition notices, are allocable, and therefore has no documentation or witness to produce in response to those requests, either.

(See Dean Letter, Ex. 1).

New York Courts generally use some or all of the following Gore factors to determine comparative fault of the parties in CERCLA matters: (1) whether a party's contribution to release is distinguishable; (2) the amount of hazardous substance involved; (3) the degree of toxicity of the hazardous substance involved; (4) the degree of involvement of the person in the manufacture, treatment, transport or disposal of the hazardous substance; (5) the degree of care taken by the parties with respect to the hazardous waste involved; and (6) the degree of cooperation between the party and state, federal, or local authorities preventing harm to the public health or the environment, including efforts to mitigate damage after a release occurs. New York State Elec. & Gas Corp. v. FirstEnergy Corp., 808 F. Supp. 2d 417, 529-30 (N.D.N.Y. 2011). Alternatively, the Torres factors have been utilized by providing a more "real world" construct for allocating CERCLA expenses: (1) the extent to which cleanup costs are attributable to the waste for which the particular parties are responsible; (2) the parties' degree of culpability; (3) the benefit realized by the party from disposal of the waste; and (4) the party's ability to pay. United States v. Davis, 31 F.Supp.2d 45, 63 (D.R.I.1998), aff'd, 261 F.3d 1 (1st Cir.2001); FirstEnergy, 808 F. Supp. 2d at 530 (holding that the volume of waste attributable to each PRP was the most relevant factor). The State does not utilize any of this routinely accepted

comparative fault tests in reaching the settlements enumerated in the Consent Decrees.

There is no discussion in the record of comparative fault and certainly no evaluation or methodology set forth in the State's Memorandum or supporting papers to be utilized in a comparative fault analysis.

A review of the papers submitted in support of the Supplemental Consent Decree is demonstrative of lack of any evidence that can be utilized in a comparative fault evaluation. The Adchem Defendants, referred to as the Lincoln Processing Defendants in the Supplemental Consent Decree, are the former tenants, operators, and landlord to a polluting subtenant at the 89 Frost Street Site, one of three of the Frost Street Properties. The State refused to sue the Adchem Defendants and does not have a direct claim against them. The Frost Street Parties have claims against the Adchem defendants in this action for contribution for the following potential costs: (1) OU-3 past costs ($1,366,908); (2) NRD damages ($2.4 – 24 million); (3) OU-2 past costs for below 150 feet below ground surface ($180,000); (4) OU-2 Deep Groundwater remediation ($10,150,000). The Frost Street experts calculate that 98% of the contamination released at all three Frost Street Sites is attributable to the period of occupancy at 89 Frost Street by the Adchem Defendants and/or their subtenant. (See Expert Report of Lori Goetz, Ex. 6, p. 2). The Adchem Defendants' own expert places this number at 59%. (See Expert Report of Robert D. Mutch, Ex. 7, pp. 1-4).

Under the terms of the contemplated settlement, for a payment of $450,000, the Adchem Defendants would receive a release from all the above-listed claims, and receive contribution protection preventing the Frost Street Parties from further pursuing any of these damages. The full extent of the information provided to the court to evaluate the fairness of this settlement by the State is a statement on the first line of the second page of the 3 page Letter Brief stating:

"The payment of costs and natural resource damages under the Supplemental Consent Decree are in line with the payments under the Consent Decree and are fair, reasonable and consistent with CERCLA largely for the same reasons as payments under the Decree." Then, the State goes on to reason because a certain payment meets a certain percentage of a cost, it is presumed fair and reasonable. For example, the State indicates in paragraph 3 of the Letter Brief that a $20,000 payment toward an $180,000 exposure was accepted by the State to "resolve the litigation". This is far from a full and fair comparative analysis. The State has in its possession the complete file on the Adchem Defendants' potential liability, and instead of providing any information to the Court to be used in a comparative fault analysis, the State, as it does in the State Memorandum in Support of the Consent Decree, relies on blanket statements pronouncing the settlements fair without providing the Court with any information to allow the Court to make an objective evaluation of the comparative fault of the parties and fairness of the settlement. Unsupported statements advanced by the State that a settlement is "fair and reasonable", without additional information for the Court to evaluate, is insufficient to demonstrate that a settlement should be approved. Arizona, 761 F.3d at 1012, 1014-15.

Approval of the Consent Decrees should be denied as the State has failed to provide any information upon which the Court can make a fair evaluation of comparative fault between the parties.

C. Contribution Protection to the Upgradient Parties for the OU-2 Deep Groundwater Contamination Without Allocating Settlement Proceeds and/or Insufficient Consideration is Unfair and Unreasonable on its Face.

Since 2004, and currently, the State is demanding that the Frost Street Parties design and implement a remedial system to address the contaminated groundwater under the Frost Street Property at depths between 150 and 250 feet below ground surface (bgs) ("OU-2 Deep

Groundwater"). (Heaney Aff., Ex. 2, pp. 2-5; Letter from Alali Tamuno dated July 30, 2009, Ex. 8; Letter from Jeffrey Dyber dated December 1, 2009, Ex. 9). The Frost Street Parties have declined to implement the OU-2 Deep Groundwater remedy[11] and DEC has indicated that it is going to design and implement the system and seek to recover its cost from the Frost Street Parties. (Id.)

The Frost Street Parties believe that, as supported by their environmental experts, the contamination in the OU-2 Deep Groundwater originates from the Upgradient Defendants' sites. (See Caldwell Aff., Ex. 3, pp. 4-7). The current projected cost for the installation and maintenance of the OU-2 Deep Groundwater system is in excess of $10,150,000. (See Heaney Aff., Ex. 2, p. 5).

The Frost Street Parties have asserted a contribution cost claim against the Upgradient Defendant for these damages in this action.[12] The Frost Street Parties are pursuing the Upgradient Defendants in this action for substantial costs expended to date on the OU-2 Deep Groundwater remedy in excess of 160 feet bgs and the future cost of the OU2 Deep Groundwater remedy of $10,150,000. (Heaney Aff., Ex. 2, pp. 2, 5).

The Consent Decree, if approved, would result in a dismissal of these claims as the contribution protection provisions of the Consent Decree covers the OU-2 Deep Groundwater damages of the Upgradient Defendants. (Consent Decree at ¶¶ 2, 27). The Consent Decree also indicates that the Upgradient Defendants are being released from the OU-2 Deep Groundwater liability for no consideration. (Id. at ¶ 20). The entire Upgradient Defendants' settlement

[11] The State's arbitrary demand in the settlement negotiations of this case, that the Frost Street Parties investigate and potentially remediate the OU-2 Deep Groundwater, while the State grants the Upgradient Defendants contribution protection for these damages, was the sole issue preventing the Frost Street Parties from settling this action. The Frost Street Parties refuse to investigate and potentially remediate this zone of contamination at a cost of more than $10,150,00, without having the right to pursue the parties they believe caused the contamination in this zone.

[12] See Frost Street Parties Answer, Cross-Claim and Third-Party Complaint, State of New York et al. v. Next Millennium Realty, LLC, et al., Index No. 06-cv-1133, Document No. 88, Feb. 13, 2007.

contribution of $1,850,000 is being attributed to the Eastern Plume OU-3 past costs and NRD claim. (Id.; State Memorandum at 19; Consent Order at 12). No part of the settlement consideration is being allocated toward the OU-2 Deep Groundwater remedy.

The release of liability and grant of contribution protection for the Upgradient Defendants of all liability for costs or contribution for the OU-2 Deep Groundwater expended to date and future costs, for no consideration, is obviously not substantively fair and reasonable. Moreover, there is no evidence in the record or mention in the State Memorandum that the State evaluated this aspect of the settlement or did a comparative analysis of the damage exposures for these costs. On its face the grant of contribution protection for a claim in excess of $10,150,000 for no consideration is not reasonable or fair and should be rejected by the Court.

The release of these claims is also inconsistent with the objectives of CERCLA. To release a potentially responsible party from liability that the State deems necessary for the protection of health and environment, for no consideration, is on its face inconsistent with the objectives of CERCLA.

D. Allocation of Any Portion Of the Settlement Proceeds to NRD Damages is Unsupportable, Arbitrary, Unfair, and Unreasonable.

Once all the settlements are tallied,[13] the State will likely recover substantially more than its claim for OU-3 past costs. Accordingly, the State is attempting to allocate substantial percentages of the settlements toward a dubious NRD claim. The percentages being attributed to the NRD claim arbitrarily vary between the Consent Decree (approximately 35%) and the Supplemental Consent Decree (20%). Nonetheless, substantial portions of the settlement proceeds are being attributed to an unsupportable NRD claim. This is not consistent with the substantive fair and reasonable test. Additionally, the State must demonstrate a method for

[13] It is anticipated that a Second Supplemental Consent Order will be submitted for one or both or the remaining non-settled parties. This could add an additional $1.1 million to the settlement total.

evaluating comparative fault for NRD damages between the parties. The State has made no attempt to do this and has introduced no material for the Court to make a fair comparative fault evaluation for NRD damages.

i. No Settlement Proceeds Should Be Allocated to NRD Damages.

The State is not entitled to NRD damages in this case. To be entitled to recovery of NRD damages for groundwater, the State must show that it suffered a temporary loss of use of the aquifer or a permanent loss of use of the aquifer. See New Mexico v. General Electric, 467 F. 3d 1223 (10th Cir. 2006) (holding that the State of New Mexico was not entitled to recover NRD damages for groundwater contamination because there was no temporary loss of use of the aquifer and the remedy required full restoration of the aquifer). In this case, the State cannot demonstrate a temporary loss of the use of the aquifer or a permanent loss of use of the aquifer, as it will be fully restored by the EPA OU-1 remedy.

The facts in this case fit squarely with the facts enumerated in New Mexico. As in New Mexico, there has been no temporary loss of the use of the OU-3 aquifer. (Dyber Dep. at pp. 110-115, Ex. 5). Adequate well head treatment has been installed and placed in operation at all relevant times. (Affidavit of Daniel Davis at p. 39, Mar. 27, 2009, Ex. 10). At no time have the Bowling Green wells been taken out of service or not used for the production of potable water. (Id.)

Moreover, the EPA OU-1 ROD requires the full restoration of the OU-3 aquifer to levels of contamination below maximum concentrations levels ("MCLs"). Accordingly, there will be full plume remediation below MCLs of the OU-3 aquifer. Jeffrey Dyber, the DEC Project Manager confirmed in his depositions that there has been no temporary loss of the use of the aquifer and that the long term remedy requires full plume restoration. (Dyber Dep. at pp.110-

115). At no time, has the State suffered a lost use of the groundwater either temporary or permanent.

As the State's NRD claim is not supportable by law and the facts of this case, it is not fair and reasonable for the State to allocate large sums of settlement proceeds to a valueless claim. It is respectfully submitted that no allocation of settlement proceeds be attributed to this claim. Alternatively, it is respectfully requested that the Court order a hearing on the value of the NRD claim.

ii. The State Failed to Properly Calculate NRD Damages.

The Code of Federal Regulations sets forth a detailed procedure for the calculation of Natural Resources Damages. (43 CFR § 11.13 et seq.). Before assessing the Natural Resource Damages, the State must prepare an assessment plan, to ensure that the assessment is performed in a planned and systematic manner and that the methodologies chosen demonstrate reasonable cost. (43 CFR § 11.13). Next, the State must complete the assessment in three phases for a complicated case. The State must determine the injury to the natural resource to establish that a natural resource has been injured as a result of the discharge or release of a hazardous substance. The State must quantify "the extent of the injury to the resource in terms of the ***loss of services*** that the injured resource would have provided had the discharge or release not occurred." (Id. (emphasis added)). Finally, the State must determine the appropriate compensation following acceptable cost-estimating and valuation methodologies. (Id.)

This procedure was not followed here. (See Affidavit of Sharon L. Brooks in Support of Motion to Approve Consent Decree, Ex. 11). An NRD assessment was not performed in this matter. The State did not produce an expert other than Sharon Brooks, who did not conduct an assessment of the Natural Resource Damages in this case. Rather, she conducted a "preliminary

estimate of the compensable value of the services that were lost as a result of contaminated groundwater" even though there has been no loss of use of the Bowling Green well. She estimated the damages by purportedly calculating the market value of acquiring the development rights of nearly 200 acres of undeveloped real estate.

Ms. Brook's analysis is faulty. First, there has been no loss of use of the aquifer. The aquifer was never taken out of service and the aquifer will be fully restored. Thus, the State's assertion that NRD damages equal the amount of money to acquire a replacement recharge area is baseless. Moreover, the State's position that replacement costs are the purchase of underdeveloped land is not supported by the current recharge system, which is located in a highly developed industrial area.

iii. Comparative Fault Analysis for NRD Damages.

In his deposition testimony, the DEC Project Manager for OU-3, Jeffrey Dyber, testified he was asked to calculate the plume size for each of the three plumes in OU-3. In furtherance of this request, he conducted calculation of the Eastern, Central and Western Plumes by using polygons to calculate plume sizes. (Dyber Dep. at pp. 141-149, Ex. 5). These plume sizes in OU-3 were utilized by DEC to determine the size of the contaminated area and in turn to compute the potential damages. DEC has this information in its possession, but has not provided it to the Court for purposes of a comparative fault analysis.

The relative plume sizes should be utilized to make a fair allocation of damages between the parties. It is clear that the Western Plume is much larger than the Eastern Plume in geographical size. Accordingly, a greater responsibility for NRD should be attributed to the Western Plume. DEC has done the relative plume size calculations, but has not incorporated them into a comparative fault analysis or provided them to the Court or parties. (See Dyber Dep.

at 141-149, Ex. 5).

E. The State Does Not Make a Comparative Fault Evaluation For Past Costs.

As discussed above, when courts are evaluating CERCLA settlements for determinations of whether the settlement is substantively fair and reasonable, an evaluation of the comparative fault of the parties is necessary. Arizona, 761 F.3d at 1008, 1011-12. The reason for this is that the settling parties are receiving releases and contribution protection from the government, cutting off the non-settling parties' right to seek contribution from the settling parties. In comparative fault cases not involving CERCLA, this is not an issue for non-settling defendants. In non-CERCLA matters, if the government settles a co-defendant out for less than his fair share, the non-settling party is not typically exposed to additional liability and the non-settling defendant's exposure is limited to his percentage of the harm at trial.

CERCLA, with its strict joint and several liability provisions, creates a different and greater exposure for non-settling parties. If the government settles a party out of the action for less than its fair share, the non-settling party is potentially responsible for any deficiency in the settlement for less than full value. Because of this risk, district courts are charged with the responsibility to make certain that settlements as incorporated in CERCLA consent decrees, are fair and reasonable. Arizona, 761 F.3d at 1008, 1014-15. In other words, the Court is charged with the task of ensuring that a settling party is not receiving a release and contribution protection for less consideration than is reflective of its fair share of the overall liability, minus a reasonable discount for litigation risk. For the Court to determine if a party is paying its fair share of the harm for which that party is legally responsible, the court must evaluate the comparative fault of the parties.

In seeking approval of a CERCLA settlement from the Court, the government must lay out the methodology employed in the comparative fault analysis and demonstrate that the methodology is "based upon, and roughly correlated with, some acceptable measure of comparative fault, apportioning liability among the settling parties according to rational (if necessarily imprecise) estimates of how much harm each PRP has done." United States v. Cannons Eng'g Corp., 899 F.2d 79, 87 (1st Cir. 1990). No method of evaluating how much harm each PRP has done in this case has been advanced by the State.

In this case, some plumes are bigger than others, some parties contributed more contamination than others, some parties operated longer than others, some parties are landlords who never conducted operations at the site, some parties have limited ability to pay, some sites are highly contaminated, others are not. These are all factors that should be weighed into a meaningful comparative fault analysis in the CERCLA settlement context. This Court, or any other party, is unable to evaluate these comparative fault factors or any other allocation factors, based upon the current record.

In this action, the State, as admitted by AAG Dean, does not believe that an allocation of damages or responsibility is necessary and has no witnesses or documentation to support a division of harm. (Dean Letter, Ex. 1). Instead, the State proposes a division of past costs based upon a straight per-capita division of costs by cost category. (See Cost Summary at Ex. C to State Memorandum).

The State's cost summary is a straight up mathematical allocation of damages based upon a per capita division of costs. See per capita calculation sheets. (Id. at pages 4, 20, 27, 34, 36, 71, 75, 77, 79, 83, 85, 87, 89, 95, and 99). The majority of expenses were split equally between the 13 Sites, with the exception of Bowling Green well field costs and some relatively small

preliminary site investigation ("PSA") costs which were split per capita among the sites involved in the PSA.

Exhibit II-E is an example of how the State divided past costs. (Cost Summary at p. 36). In this example, the State totaled its off-site personal service costs at $930,497.47. It then divided the total by 14 sites (13 sites in this action and the defunct Laka site). The per-capita share is $66,464.11. This $66,464.11 figure was then attributed to each of the 13 sites equally. No notion or comparative fault is employed in this calculation. Each party is treated equally on a per-capita basis.

With respect to costs associated with the Bowling Green well field, instead of dividing the costs by 13, these costs were divided into 9 equal parts as the Western Plume sites were not included in this cost category. Again, the Bowling Green costs were split into 9 equal parts without any consideration of comparative fault between the 9 Eastern and Central Plume sites. (See Cost Summary at pages 77 and 85). This is the same methodology employed for all costs.

This straight up division of damages based upon per-capita shares versus comparable fault does not provide a measure of relative harm caused by the parties. This approach should be rejected by the Court.

Even if the approach is accepted, the State deviates from the approach with no explanation. For example, Arkwin had total unreimbursed costs of $445,672 on the Cost Summary and settled for $475,000, while Grand Machinery Inc. (36 Sylvester Street) had total unreimbursed costs of $432,000 and settled for $235,000. (Cost Summary at page 2 and State Memorandum at 14-15). There is no explanation in the record as to why two parties with similar per capita costs as enumerated in the Cost Summary are treated significantly different for settlement purposes. How is the Court expected to evaluate the fairness of this deviation in an

informational vacuum?

Finally, the Upgradient Defendants and Adchem Defendants are not on the Cost Summary. The State offers no explanation as to how the settlement amounts for these Third-Party Defendants were calculated and what comparative fault factors were considered. The State's bare and bold pronouncement that these settlements are fair and reasonable without providing a rational factual basis must be rejected. See Arizona, 761 F.3d at 1008, 1014-15.

i. Settlements With Non-Polluting Landlords.

The Frost Street Parties are the successors to the landlords that leased the Frost Street Properties to various tenants between 1965 and 1982 when contamination was introduced to the Frost Street properties by tenants engaged in manufacturing activities. Neither the Frost Street Parties nor their landlord predecessors ever occupied the Frost Street Sites. Current data and information indicate that the vast majority of the contamination on the Frost Street properties was disposed of at the 89 Frost Street property between 1966 and 1976 by the Adchem Defendants and their subtenants.

It is well-established law in this Circuit that a non-polluting landlord should be allocated a fraction of the CERCLA liability versus the parties that occupied the properties and polluted. In Bedford Affiliates v. Sills, 156 F.3d 416 (2d Cir. 1998), the Eastern District Court ruled, and Second Circuit affirmed, that an innocent landlord, such as the Frost Street Parties, had a CERCLA allocation of 5 percent of liability and the polluting tenant was responsible for 95 percent of the cost. This range of allocation of CERCLA liability for non-polluting landlords has been followed by numerous other courts over the years.

The Frost Street Parties and other non-polluting landlord defendants should be given the benefit of their status as a non-polluting landlord in any comparative fault evaluation. The

record is silent on this comparative fault factor.

POINT II

THE FROST STREET PARTIES' DECLARATORY JUDGMENT ACTION AGAINST THE SETTLING DEFENDANTS IS NOT BARRED BY CONTRIBUTION PROTECTION AND SURVIVES THE SETTLEMENT

The Frost Street Parties have an active cause of action pending in this action for a declaratory judgment for contribution for all future response cost to be incurred by the Frost Street Parties. (See Frost Street Parties Answer, Cross Claim and Third-Party Complaint at Document 88 at pp. 21-47). Relevant provisions of the Third-Party Complaint state:

(1) in the description of the Nature of the Action:

> 1. This is a third party complaint under . . . CERCLA . . . for a declaratory judgment . . . holding Third Party Defendants jointly and severally liable for response cost to be incurred by [the Frost Street Parties] at the Sites. (Id. at 22).

(2) in the Third Cause of Action for Declaratory Judgment:

> 132. [The Frost Street Parties] are entitled to a declaratory judgment pursuant to CERCLA . . . holding Third Party Defendants responsible for the existence of hazardous substances at the Sites and liable for the current, future and past cleanup costs for the Sites. (Id. at 45).

(3) in the Damages Clause:

> WHEREFORE, the [Frost Street Parties] demand judgment . . .
>
> (2) On the Third Cause of Action, a declaration holding the Cross-Defendants responsible for the existence of hazardous substances at the Sites and liable for the current and future cleanup costs and past costs for the Sites. . . . (Id. at 46).

The Frost Street parties have pled, litigated and maintained, a cause of action for a declaratory judgment for all "future cleanup costs" incurred at the sites. The relief requested is not limited to cleanup costs owed to the State, but covers all future cleanup costs whether owed to the State, another party, or the United States Environmental Protection Agency ("EPA").

CERCLA grants contribution protection for all claims released by the government in a judicially approved consent decree. Importantly, CERCLA contribution protection does not apply to claims not released in the settlement. Specifically, CERCLA states:

> A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding **matters addressed in the settlement**.

42 U.S.C. § 9613(f)(2) (emphasis added).

The matters addressed in the provision in the Consent Decrees specifically carve out the State's future cost claim for future costs owed by the State to the United States. Accordingly, contribution protection does not apply to the State's claim for future costs owed the United States. Likewise, the settlement does not resolve liability for the EPA OU-1 remedy and other potential costs owed to the EPA.

The contemplated settlement does not fully resolve the question of apportioning all damages, past and future. It is a piecemeal approach. The Frost Street Parties have asserted claims against the parties responsible for the environmental contamination at their Sites. More than a decade of litigation has been funded in pursuit of a finding of liability against the parties who contaminated the Frost Street Sites for both past and future costs. The fact that the State may be permitted to harvest some of the low hanging fruit in this settlement and grant contribution protection for some of the claims, does not extinguish the Frost Street Parties' cause of action for a declaratory judgment for matters not addressed in the settlement, including the States' future costs and the future costs potentially owed to others, including EPA, for the Frost Street Sites.

POINT III

MOTION TO SEVER FUTURE COST CLAIMS AND STAY

The Frost Street Parties do not take a position on this motion. Any stay issued for the State future cost claim should not apply to the Frosts Street Parties' declaratory judgment claim for a determination on future cost contribution.

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that the Consent Decrees not be approved by the Court and the discovery stay be lifted in this action.

Dated: December 29, 2014
Windham, New York

_____/S_____
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